In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

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No. 196

ERNEST H. DENICKE,

Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Respondents.

BRIEF OF RESPONDENTS, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR. IN RESPONSE TO PETITIONER'S MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

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A mere reading of the motion of petitioner to correct diminution and for the enlargement of the records before this court will demonstrate its utter lack of merit, and were it not for the charges made against the Circuit Court of Appeals, 9th Judicial Circuit, and the members and clerk of that court, scant attention would be given by respondents to such motion for the obvious reason that the enlargement of the records if directed by this court can in no manner affect the legal propositions involved in petitioner's application for certiorari.

By his motion, petitioner seeks to have included in the record:

1. The signatures of the three judges of the Circuit Court of Appeals who concurred in the decisions affirming the judgments of the court below; and

2. An inquiry made of counsel for the respective parties during the course of the oral argument by Judge Healy and his statement of the reason for such inquiry, together with the response made thereto by petitioner's counsel and a part of the response made by counsel for respondents.

The reasons for the making of the pending motions as indicated by petitioner require its denial. These reasons briefly stated are as follows:

1. According to petitioner the enlargement is requested for use in an application for certiorari now pending before this court in Case No. 155, October Term 1944, entitled "Ernest H. Denicke, et al., Petitioners v. The Anglo California National Bank of San Francisco, et al., Respondents", which is a controversy entirely separate and

distinct and having no legal connection with the instant controversy. That the records in this case cannot be utilized in the case just referred to is too plain and obvious to require supporting argument.

2. It is next asserted that the Circuit Court of Appeals of the 9th Judicial Circuit has a present membership of six judges and that in order to obtain a rehearing before that court the vote of four judges is essential. It is then stated that the opinion affirming the judgments of the District Court evidences "DELIBERATE refusal to pass upon the questions presented in support of appeal" and because three of the six judges signed such opinions a rehearing by that court would be impossible.

The bare circumstance that three of the six judges signed the opinion subjected to attack is no indication that a petition for rehearing if meritorious would not be granted or that because of such situation the failure to file an application for rehearing is excusable. The records of all appellate tribunals, both federal and state, including this court, furnish ample evidence that rehearings are not uncommon and that the orders granting such rehearings are in most cases signed by the particular judge or judges who rendered the decision sought to be reviewed. The transcript of argument of counsel in the lower court is no part of the record on appeal.

3. That a judge, during an oral argument, may have addressed inquiries to counsel respecting phases of the controversy being heard by the court, or addressed to legal propositions involved in the controversy, is no indication that any doubt that he may have entertained respect-

ing the matters inquired of was not removed by later reflection or by subsequent consideration of the printed briefs. Certainly the decision itself concurred in by such judge is in itself a complete confirmation of the statement just made, as well as a conclusive refutation of the veiled and other charges made by petitioner against the court, principally, however, in the petitions for certiorari and its accompanying points and authorities.

Aside, however, from what has already been stated, which in our opinion demonstrates the motions to be devoid of merit, we submit that they should be promptly denied. Without the slightest justification the motion and accompanying affidavit and brief is implicit with an accusation against the three members of the court who signed the opinion, and its clerk. The charges are amplified and stressed in the petition for certiorari and its accompanying brief as well as in the petition, brief and motion filed in the companion case (*Doble v. Buck, et al.*, No. 197) to which reference is herein made by petitioner. To accuse the clerk of attaching to a record a "false certificate" because the signatures of the judges who signed the opinion certified to this court were omitted in accordance with an unvarying practice long established and pursued, is entirely unjustified. To charge judges of that court, whose sole offence was that of deciding this controversy against petitioner, that they signed an opinion evidencing "deliberate" refusal to pass upon questions raised by petitioner upon his appeal and made statements in such opinion not in accord with the truth, constitutes in our judgment, conduct that, to say the least, is not commendable.

To hold that a court is legally obligated in its opinion to discuss and give therein consideration to every proposition argued by the parties in their briefs, regardless of their importance or merits, and particularly where the controversy is ruled by the determination of an overshadowing and controlling principle or precept which disposes of the whole controversy, would unnecessarily enlarge the duties and tax the patience of the members of our courts beyond human endurance.

It is respectfully submitted that petitioner's motion should be denied.

Dated, San Francisco, California,
July 24, 1944.

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Respondents.

BRIEF OF RESPONDENTS, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR.

PETITION FOR CERTIORARI SHOULD BE DENIED UNDER RULE 38(b) OF THIS COURT.

The decision of the Circuit Court of Appeals here subjected to attack is confined solely to the construction placed by it upon petitioner's amended complaint.

A mere reading of the decision of the Circuit Court of Appeals in this controversy will quickly demonstrate that it neither conflicts with any decision of this Court, nor with any decision of another Circuit Court of Appeals on the subject to which it relates, nor does the decision come within any of the other provisions of Rule 38(b) of this Court. In fact, in his pleading petitioner affirmatively alleges:

> "There is no decision of any court of last resort determining the issue in this respect, * * *." (Rec. p. 35.)

Furthermore, an examination of the petitioner's pleading upon which the decision is based will establish that it was not legally susceptible of any construction other than that placed upon it by the Court below. For these reasons alone the pending petition should be denied.

STATEMENT OF THE CONTROVERSY.

The unusual type and structure of the petition filed herein, as well as the unwarranted strictures leveled by petitioner against the Court below and certain of its judges, renders somewhat difficult the task of preparing a brief but adequate response.

As we read the pending petition and its accompanying brief, the principal ground upon which the opinion of the Court below is challenged is because it fails to make mention of certain allegations contained in the Third Count of petitioner's amended complaint wherein it is asserted that the damage claimed to have been sustained by him was due to the alleged publication by the Anglo London

Bank of a false statement of the condition of its capital and surplus, in the belief of the truth of which petitioner asserts he relied.

That the Court below was justified in ignoring these allegations in its construction of such Third Count and in treating that count as asserting no cause of action not pleaded in the First and Second Counts of petitioner's amended complaint, cannot seriously be disputed, and can readily be demonstrated.

While the opinion of the Court below accurately summarizes the gist of the causes of action set up in petitioner's pleading, in order that it may be quickly shown that such allegations of the above mentioned Third Count constitute no material part of the cause of action therein asserted and that in legal effect it was identical with the remaining counts in petitioner's pleading, we believe it necessary to supplement the review of the pleadings set forth in the opinion of the Court below by briefly calling the attention of the Court to some of the controlling allegations appearing in each count of petitioner's amended complaint. In this connection we will also show that no cause of action was, or, in truth, could be based upon the publication of such alleged false financial report and that such allegations in the circumstances here existing were nothing more or less than pure sham which it was the duty of the lower Court to disregard in construing the legal effect of such Third Count.

First Count.

Petitioner's First Count proceeds upon the theory that 12 U. S. C. A., Section 34(a) imposed upon the officers and directors of the two banks proposing to consolidate

the **duty** of **affirmatively** advising the shareholders of each of the banks of the right accorded them by such Section 34(a) to dissent to the plan of consolidation and demand appraisement and redemption of their shares. In support of this theory it is alleged that for the purpose of defrauding such shareholders, including petitioner, respondents failed to perform such duty and refrained from furnishing them with any information respecting such right and that petitioner being **ignorant of, and not knowing that he possessed such right,** failed to dissent to the proposed consolidation. In this connection petitioner also alleged that the notice of the shareholders' meeting was false and fraudulent

> "* * * in failing to advise or notify the shareholders of Anglo Trust Co., including plaintiff, of the fact that the said agreement was in violation of said section, and that there might exist any redemption right independently of the provisions of said agreement." (Rec. p. 12.)

and likewise challenged the agreement itself as being fraudulent because it omitted

> "* * * therefrom all reference to any statutory right or provision which might be employed by shareholders of said bank as a basis of any redemption rights." (Rec. p. 13.)

Inasmuch as the notice to shareholders and the consolidation agreement are attached as exhibits to the pleading they speak for themselves and allegations contra to their contents necessarily were ineffective. In passing, however, we believe it proper to advise the Court that the notice of the shareholders' meeting expressly stated that the meeting was to be held

"* * * for the purpose of considering and determining by vote whether an agreement to consolidate the said bank and The Anglo & London Paris National Bank of San Francisco * * * *under the provisions of the laws of the United States,* shall be ratified and confirmed * * *" (Rec. p. 65.)

Because of the character of the claim thus made by petitioner, he realized that in order to state a cause of action it was essential to show that he **lacked knowledge** of such rights, and accordingly he alleged:

"Said documents constituted the only information which plaintiff ever received in connection with such consolidation proceedings. He acted solely upon this information unlawfully submitted to him in violation of 12 U. S. Code, Sec. 342 (8)." (Rec. pp. 13 and 14.)

"The damages claimed under this count are the result of a loss which plaintiff sustained **through ignorance of his legal rights** in connection with the consolidation proceedings of June 30, 1932, which are above referred to. **Plaintiff did not know and had no means of knowledge of the nature or extent of said rights** because of each of the following facts * * *" (Rec. p. 19, par. XI.)

"Notwithstanding any fiction of law, or technical presumption claimed to arise against him by any construction of 12 U. S. Code, Sec. 34a, *plaintiff did not in fact have any knowledge or means of knowledge of any right or remedy available to him* under said section. * * * *All acts and things which plaintiff did in that behalf were the (14) result of such ignorance on his part.*" (Rec. p. 21.)

It will thus be observed that with respect to this cause of action petitioner positively and unequivocally asserted

that he had no knowledge and was entirely ignorant of his right to dissent from the plan of consolidation and demand appraisement and redemption of his shares.

It must likewise be apparent that if, due to the fiduciary relations existing between petitioner and respondents, it was their duty to furnish petitioner with information respecting such rights, or if they engaged in a conspiracy to conceal such information from him, which is denied, such fraudulent conduct would give rise to a claim at common law and would not be based upon a violation of any federal statute.

Second Count.

In his Second Count petitioner incorporates by reference all of the allegations of Count One. (Rec. p. 24, par. 15.) In the remaining allegations of Count Two petitioner asserts that because he was required to take stock in Anglo California Bank in lieu of his stock in Anglo Trust Company **without having been informed of his legal right to dissent to the plan,** the due process clause of the Fifth Amendment to the Constitution of the United States was violated. (Rec. pp. 24-27.)

The allegations of this Second Count clearly indicate that petitioner's alleged rights to relief thereunder are based upon the erroneous assumption that Section 34(a) imposed upon respondents the *affirmative duty* of advising the shareholders of the respective banks of the existence of such legal rights.

A reading of the lower Court's opinion will undoubtedly convince this Court that it completely covers and properly construes the two counts just mentioned. This brings

us to the Third Count, which petitioner claims was not given separate mention in the lower Court's opinion. That it states no cause of action different than those expressed in Counts One and Two and therefore received proper construction by the lower Court in its opinion which covered the entire pleading, conclusively appears.

Third Count.

In this Third Count petitioner attempts to assert, but ineffectively, the additional claim that between March 1, 1932 and July 1, 1932, the Anglo London Bank published a false and fraudulent statement respecting its capital and surplus; that petitioner acted in reliance upon the belief that such balance sheet as published was true, and that the damages sustained by him were a direct consequence of such publication.

Petitioner, however, again by reference, incorporated in this count ALL of the allegations contained in Count One (Rec. p. 28, par. 19), wherein, as above shown, he avers that the SOLE reason he failed to exercise the said legal rights accorded him by Section 34(a) was because they were UNKNOWN to him, thus making such allegations part of said Count Three, which allegations conclusively establish that it would have been humanly impossible for petitioner to have failed to dissent and demand appraisal and redemption of his stock in reliance upon the alleged false balance sheet.

Furthermore, said Third Count does not state a cause of action based upon said alleged false statement for the reason that it is not asserted therein that petitioner ever read, saw, or heard of said financial statement at any time

prior to the effective date of the consolidation. His sole allegation upon this point is as follows:

> "Plaintiff acted in reliance upon the belief that the balance sheet of Anglo London Bank as published before said consolidation was a true statement thereof." (Rec. p. 33.)

All doubt upon this subject, however, is dispelled by the reading of a portion of paragraph XXVII of petitioner's amended complaint, which is expressly made applicable to ALL of its counts, including the Third Count, wherein petitioner specifically alleges that

> "Plaintiff did not have knowledge of any of the facts set forth in this pleading prior to December, 1938." (Rec. p. 41, par. XXVII.)

which date was more than six years after the consolidation was effected.

It was, therefore, apparent to the lower Court that if, as claimed in ALL of the counts of petitioner's amended pleading, he had no knowledge but, on the contrary, was ignorant of his legal right to dissent from the plan of consolidation and require appraisal and redemption of his shares, which allegations constitute a part of his Third Count, and if, as alleged, petitioner did not have knowledge of any of the facts set forth in his pleading prior to December, 1938, *he could not have made any election in reliance upon the alleged false financial statement.* The two sets of allegations of act referred to are absolutely contradictory and mutually exclusive. To have made both under oath would have at once rendered petitioner guilty of perjury.

This condition of the record necessarily compelled the lower Court to construe petitioner's entire pleading, including the Third Count, as indicated in its opinion. No other construction was legally possible or could legally be imputed to it. It is clearly manifest that such Third Count was added to the amended complaint as a mere afterthought and solely for the purpose of seeking to lend to this action the appearance that it is within federal jurisdiction, which, we submit, it is not.

The contents of the Third Count clearly point out why petitioner's pleading was not verified.

LAW ARGUMENT.

I.

EXHIBITS ATTACHED TO AND MADE A PART OF PETITIONER'S AMENDED COMPLAINT DESTROY HIS ALLEGATIONS IN WHICH THE CONSOLIDATION PROCEEDINGS ARE SUBJECTED TO ATTACK.

In each of the counts of petitioner's pleading the consolidation agreement and the notice of the special meeting of shareholders to consider such agreement are alleged to have been *false* and *fraudulent* and a *violation* of Section 34(a). The consolidation agreement is criticised upon the grounds that by its terms shareholders were *compelled* to exchange their stock for stock in the proposed consolidated bank; that they were *prohibited* from demanding or exercising any optional right to demand or to receive any cash payment for their shares as provided in Section 34(a); that by such contract a *compulsory* allotment of shares in Anglo National Bank was

made the *exclusive* right of petitioner in exchange for his shares in Anglo Trust Company.

In this connection the Court should bear in mind that the consolidation agreement does not become effective unless and until it has been ratified and confirmed by the affirmative vote of the shareholders of each bank owning at least two-thirds of its outstanding capital stock, nor does it affect the rights of any shareholder dissenting from the consolidation.

The consolidation agreement is attached to petitioner's pleading as Exhibit "A" and the notice to shareholders as Exhibit "C". If these two exhibits, and their legal effect, establish, as respondents submit they do, the falsity of petitioner's allegations directed to them, such allegations must be struck down and be entirely disregarded.

Benedict v. Price, 38 F. (2d) 309;

Simmons v. Peavy-Welsh Lbr. Co., 113 F. (2d) 812 (C.C.A. 5th Circuit);

Peleleas v. Caterpillar Tractor Co., 30 Fed. Supp. 173 at 177.

II.

ALLEGATIONS OF THIRD COUNT RESPECTING FALSE FINANCIAL STATEMENT OF ANGLO NATIONAL BANK, AND PETITIONER'S RELIANCE THEREON WERE PROPERLY DISREGARDED IN CONSTRUING PETITIONER'S PLEADING.

The substance of petitioner's Third Count has been heretofore shown (supra pp. 7-9).

Inasmuch as petitioner in all counts of his pleading (including his Third Count) alleges that he had no

knowledge and was ignorant of the provisions of Section 34(a) giving him the right to dissent to the consolidation and demand appraisement and redemption of his stock, and as he had no knowledge of the financial statement referred to until six years after the consolidation was effected, there could not be the slightest causal connection between the alleged fraudulent report and petitioner's failure to dissent, and it is apparent that the irrelevant and sham allegations respecting the false report were alleged only to give the pleading the color of a claim within Federal jurisdiction.

The principle which forms the basis for the contention here made has repeatedly been given recognition by the Courts in cases where permission was refused to file an amended pleading containing allegations inconsistent and irreconcilable with the pleading proposed to be amended.

Wright v. City of Pasadena, 37 F. (2d) 902 (District Court, S. D. Cal.);
Tognazzi v. Wilhelm, 6 Cal. (2d) 123;
Harney v. Corcoran, 60 Cal. 314;
Silica Brick Co. v. Winsor, 171 Cal. 18;
Williams v. Joyce, 147 Cal. 151.

The principle enunciated in the foregoing authorities was approved in,

Boatmen's Bank v. Fritzen, 89 Pac. (Kan.) 915, at pp. 917-919,

where the judgment of the lower Court was reversed upon the ground that the case should have been moved to the Federal Court, which decision was affirmed in,

Fritzen v. Boatmen's Bank, 212 U. S. 364, 53, L. Ed. 551.

III.

PETITIONER WAS CHARGED WITH KNOWLEDGE OF THE LAW ACCORDING HIM RIGHT OF DISSENT TO THE CONSOLIDATION AND, IN SUCH EVENT, RIGHT TO DEMAND APPRAISEMENT AND REDEMPTION OF HIS STOCK.

No duty was imposed upon respondents to advise petitioner of the legal rights afforded him by Section 34(a) entitling him to dissent to the consolidation and, in such event, to demand appraisement and redemption of his shares, for the reason that such rights are conferred upon shareholders by law, and it is an elementary proposition that all shareholders of the consolidated banks were charged with knowledge of the law, including the rights accorded them thereby. This proposition, which is fundamental, has been asserted by the Courts in many cases with respect to various sections of the National Bank Act, with the provisions of which individuals have been held to be charged with knowledge.

Texas & Pac. R. Co. v. Pottorf, 63 F. (2d) 1;

Pickett v. Trixler, 93 F. (2d) 198 (certiorari denied, 303 U. S. 652);

Littrell v. Craig, 1 Fed. Supp. 491;

Beechwood Securities Corp., Inc. v. Associated Oil Co. et al., 104 F. (2d) 537;

National Supply Co. v. Leland Stanford Jr. University, 134 F. (2d) 689;

Schickler v. Washington Brewery Co., 33 Appeal Cases (Dist. of Columbia);

Federal United Corp. v. Havender, 11 Atl. (2d) (Del.) 331.

IV.

THERE IS NO MERIT IN THE CONTENTION THAT THIS CAUSE REQUIRES THE CONSTRUCTION OR INTERPRETATION OF A FEDERAL STATUTE.

Petitioner does not allege that the respondents omitted to perform any of the procedural steps required by the plain directions of Section 34(a); he admits that there was an agreement, approval of it by the boards of directors and ratification by the shareholders. He does not allege that he voted against the consolidation so as to become entitled, as the section provides, to the appraisal of his shares and payment therefor, and in his brief in the Court below it is conceded that he voted for such consolidation. The gist of his complaint is that he did not exercise his rights under the section in the manner in which he now feels he should have exercised them, and that his failure to do so was caused by the alleged fraud practiced on him by respondents. In order to invoke the Federal jurisdiction they argue that the fraud was a violation of some duty owed by respondents by virtue of provisions of Section 34(a) which cannot be found in that section.

There is no language in that section which affords even a remote possibility of the construction which petitioner seeks to have made. The alleged wrong of respondents consisting in preventing petitioner from properly acting under that section was something apart from the provisions and requirements of the section itself. The duty breached by respondents, if any, was a breach of their *common law duty* which did not arise out of Section 34(a) but out of the relationship between the parties, and any action based thereon belongs properly in another

forum. That no precedent is in existence bearing upon such construction of Section 34(a) is readily understandable.

St. Paul M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 68 Fed. 2;

Newburyport Water Co. v. Newburyport, 193 U.S. 561, 48 L. Ed. 793.

V.

WHETHER A FEDERAL QUESTION IS PRESENTED IS TO BE DETERMINED FROM THE ALLEGATIONS OF FACT CONTAINED IN THE COMPLAINT, AND NOT FROM MERE ASSERTIONS OR CONCLUSIONS OF THE PLEADER TO THAT EFFECT.

In any case in which it becomes necessary to determine whether or not a Federal question is involved so as to form a basis for Federal jurisdiction, resort must be made to the factual allegations of the complaint. It is not enough that the existence of a Federal question is iterated by mere assertions of the pleader to that effect, or by allegations amounting to mere conclusions of law. This principle finds expression in many cases, including, among others:

Cuyahoga River Power Co. v. Northern Ohio etc. Co., 252 U. S. 388, 64 L. Ed. 626;

Herrmann v. Edwards, 238 U. S. 107, 59 L. Ed. 1224;

Ray v. Marion County, 71 F. (2d) 509;

Colonia Drug & Sales Co. v. Western Products Co., 54 F. (2d) 216;

Carolina & N. W. Ry. Co. v. Town of Lincolnton, 33 F. (2d) 719.

VI.

A CAUSE OF ACTION ARISES UNDER THE LAWS OF THE UNITED STATES ONLY WHERE IT APPEARS THAT IT REALLY AND SUBSTANTIALLY INVOLVES A CONTROVERSY AS TO THE EFFECT OR CONSTRUCTION OF THE CONSTITUTION OR SOME LAW OR TREATY OF THE UNITED STATES UPON THE DETERMINATION OF WHICH THE RESULT DEPENDS.

It is not only well settled that a mere allegation that the action involves an interpretation of a Federal law is not sufficient to confer jurisdiction on a Federal Court but equally that it must appear from the pleading of plaintiff that there is a *substantial* conflict between plaintiff and defendant as to the meaning, interpretation and construction or effect of one or more of the United States enactments under which the action is brought.

Littleyork Gold Wash. & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656;

Corrigan v. Buckley, 271 U. S. 323;

Gully v. First Nat. Bank, 299 U. S. 109, 81 L. Ed. 70 (decided Nov. 9, 1936);

Shulthis v. McDougal, 225 U. S. 561, 56 L. Ed. 1205 (1912);

Western Union Tel. Co. v. Ann Arbor, 178 U. S. 239, 44 L. Ed. 1052 (1900);

Herrmann v. Edwards, 238 U. S. 107, 59 L. Ed. 1224 (1915).

A case directly in point is that of

Hare v. Berkenfield, 181 Fed. 825 (8th Cir.).

VII.

THE FIFTH AMENDMENT INVOKED BY PETITIONER HAS NO APPLICATION, BUT IF IT IS APPLICABLE PETITIONER'S PLEADINGS DO NOT DISCLOSE ANY VIOLATION OF THE DUE PROCESS CLAUSE THEREIN.

That the Fifth Amendment is not applicable is pointed out by the decision of the Court below, as well as by the authorities therein cited.

Petitioner's claim in respect to this Constitutional provision is based upon the theory that unless Section 34(a) be construed as claimed by him it is a violation of the Constitutional provisions. That such contention is without merit must be obvious.

The essential elements of due process of law are "reasonable notice and a reasonable opportunity to be heard".

In re Mooney, 72 Fed. (2d) 503 (9th Circuit);
Eley v. Gamble, 75 F. (2d) 171;
Drummey v. State Bd. of Funeral Directors, 13 Cal. (2d) 75, at 80 and 81;
Herbert v. Bicknell, 233 U. S. 70;
Wright v. Davidson, 181 U. S. 371;
Central etc. R. Co. v. Wright, 207 U. S. 127;
Lipka v. Laderer, 259 U. S. 557;
Hiatt v. Peddy, 73 F. (2d) 235;
Dixie v. Cannon, 32 F. Supp. 626 (affirmed 115 F. (2d) 913);
Roach v. Stastny, 104 F. (2d) 559.

That such requirements were fully complied with is clearly apparent.

Section 34(a) *does* provide for notice to the shareholders of the *time, place and object* of the shareholders'

meeting at which ratification of the consolidation agreement is to be sought, which notice must not only be published but also sent to each shareholder by registered mail. It is not denied by petitioner that these statutory requirements were fully complied with. On the contrary, it is directly alleged that all of the procedural steps required by Section 34(a) were taken and that the notice of the meeting referred to the fact that a copy of the agreement was on file at the bank for the inspection of the shareholders if they so desired, and also stated that the consolidation was being effected under the laws of the United States.

VIII.

THE ACTION IS NOT ONE TO ENFORCE A LIABILITY CREATED BY ACT OF CONGRESS SO AS TO AFFORD FEDERAL JURISDICTION ON THAT GROUND. THE GRAVAMEN OF THE ACTIONS IS MERELY A FRAUD COGNIZABLE AT COMMON LAW AFFORDING NO GROUND FOR FEDERAL JURISDICTION.

Stripped of all of its ornamentations and conclusions the action is one to enforce the liability of officers and directors of Anglo Trust Company arising out of their alleged failure to perform *fiduciary* duties claimed to have been owed by them to the shareholders of the two banks participating in the consolidation authorized by Section 34(a).

The mere fact that this controversy involves an asserted liability of directors of a national bank, and of a bank entering into consolidation with it under the terms of the Federal statute, or that both banks may have been members of the Federal Reserve System, and that therefore

certain duties were imposed upon them by the laws of the United States does not in itself bring the matter within the jurisdiction of a Federal Court. All of the defendants were, at the same time, subject to certain duties and responsibilities imposed by the common law, some of which arose out of their fiduciary relation to shareholders by virtue of their office or employment. Thus two sets of duties existed side by side but entirely distinct one from the other, as was pointed out in

Atherton v. Anderson, 86 F. (2d) 518,

in the following language:

> "It is clear that the duty which rests upon directors of a national bank by reason of the provisions of the National Banking Act are entirely separate and distinct from the duties imposed upon them by common law, Yates v. Jones National Bank, 206 U. S. 158, 27 S. Ct. 638, 51 L. Ed. 1002; Jones National Bank v. Yates, 240 U. S. 541, 36 S. Ct. 429, 60 L. Ed. 788, and 'it is obviously possible that a director may neglect one or more of the former, and not any of the latter, or vice versa'. (Bowerman v. Hamner, 250 U. S. 504, 511, 39 S. Ct. 549, 551, 63 L. Ed. 1113) * * *"

Inasmuch as Section 34(a) does not impose upon officers and directors of consolidating banks the duty of informing their respective stockholders of the right to dissent, and inasmuch as such section is not obnoxious to the Fifth Amendment, in view of the allegations contained in petitioner's pleading it necessarily follows that the alleged conspiracy does not violate federal laws, and that as the fraudulent conduct alleged to have been engaged in by respondents is based solely upon the viola-

tion of the fiduciary relations existing between them and petitioner, the causes of action therein are cognizable only in the State Courts and not in Federal tribunals.

This situation is clearly made manifest by many of the allegations contained in petitioner's amended complaint. (Rec. pp. 16; 20-22.)

From an examination of the portions of petitioner's pleading referred to the conclusion is inescapable that the action is merely for damages alleged to have been sustained as a result of the consolidation from which petitioner, by means of the carrying out of an alleged fraudulent conspiracy to conceal and misrepresent the facts involved in the transaction, was induced not to dissent.

That in the absence of diversity of citizenship, the Federal Court has no jurisdiction of such an action based upon a common law liability, is well settled.

Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. Ed. 1002;

Herrmann v. Edwards, 238 U. S. 107, 59 L. Ed. 1224;

Davis v. McFarland, 15 F. (2d) 612;

American Surety Co. v. Siebrecht, 10 F. Supp. 306.

Primarily petitioner's causes of action are based upon an alleged conspiracy to defraud shareholders. Each of these causes of action is, therefore, in tort and such actions have their genesis in local law.

Erie R. Co. v. Tompkins, 304 U. S. 64, 78;

Viles v. Symes (10th C. C. A.), 129 F. (2d) 828, 830;

Oxnard Theatres v. Paramount Pictures (S. D. Cal.), 24 F. Supp. 44, 47.

Moreover, petitioner's references, both in his pleading and in his brief, to various sections of the Civil Code and the Code of Civil Procedure of California clearly show that petitioner recognizes that his right to recover is governed by California law.

IX.

PETITIONER'S AUTHORITIES CITED IN SUPPORT OF HIS CLAIM OF FEDERAL JURISDICTION INAPPLICABLE.

The authorities cited by petitioner directed to this point may be classified into three types.

The first type relates to a cause of action created by a Federal statute. None of these authorities is pertinent for the reasons hereinabove pointed out wherein we have shown that the cause of action pleaded is not one to enforce a liability created by Act of Congress so as to afford Federal jurisdiction on that ground; that no construction or interpretation of a Federal statute is involved, and, furthermore, that the controversy does not really and substantially involve a controversy as to the effect or construction of the Constitution or any of the laws of the United States upon the determination of which its result depends.

The second type of authorities relates to cases wherein a duty is imposed by the provisions of a Federal statute, and its violation is charged. We have heretofore pointed out that the Fifth Amendment is not applicable to a case of this character and, furthermore, assuming its pertinency, nowhere in that Amendment is a duty imposed to which respondents failed to respond.

The third type of authorities involves the interpretation of a Federal statute which is completely answered by the authorities cited by respondents in support of the legal propositions hereinabove asserted by them.

X.

IRRECONCILABLE ANTAGONISM BETWEEN THE TWO PENDING ACTIONS.

While not of importance in this discussion we believe it proper to point out that a clear antagonism also exists between this action and its companion case, Doble v. Buck (No. 197), which, regardless of proofs, would prevent a recovery in both actions. Denicke claims that he sustained damage because the value of the assets in Anglo London Bank was far below the value imputed to them in the consolidation. And yet the Doble complaint proceeds upon the alleged theory that she sustained damage because of the reduced value of the stock issued to her in the consolidated institution as compared with the value of her stock in Anglo London Bank prior to such consolidation. Obviously, one of these claims is lacking in factual basis.

CONCLUSION.

It is respectfully, but with confidence submitted that petitioner's amended complaint does not allege facts showing the existence of a real and substantial controversy as to the construction and interpretation of any law of the United States, nor does it present a cause of action

to enforce a liability created by statute; that, on the contrary, each of the causes of action therein set forth is merely one for breach of duty imposed by the common law and therefore not within Federal jurisdiction; that the decision of the Court below properly construed such pleading, and that therefore petitioner's petition for certiorari should be denied.

Dated, San Francisco, California,
July 24, 1944.

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HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Attorneys for Respondents,
Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Of Counsel.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 196

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ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON, and JOSEPH O. TOBIN,
Respondents.

STATEMENT ON BEHALF OF CERTAIN RESPONDENTS ON SUBMISSION OF PETITION FOR CERTIORARI AND FOR DIMINUTION OF RECORD.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
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Respondents.

STATEMENT ON BEHALF OF CERTAIN RESPONDENTS ON SUBMISSION OF PETITION FOR CERTIORARI AND FOR DIMINUTION OF RECORD.

The undersigned counsel for various respondents in the above entitled cause, have examined the brief filed by Theo. J. Roche, Hiram W. Johnson, Theodore H. Roche, James Farraher, as attorneys for respondents Mortimer Fleishhacker and Mortimer Fleishhacker, Jr., in response to the petition for certiorari herein, and also the brief filed by said counsel in behalf of said respondents, in opposition to petitioner's motion to correct diminution and for enlargement of record. In our opinion these briefs contain an excellent and succinct statement of the facts and the law involved in these proceedings. We feel that it would be a needless repetition for us, individually, to reiterate the arguments presented in said briefs and would constitute an undue burden on the time of the Court to read independent briefs containing such reiterated arguments. Therefore, with the approval of said counsel, we adopt the statements and arguments set forth in the said briefs as being applicable to all of the respondents whom we represent, and ask that they be so considered by the Court.

Dated, San Francisco,
August 30, 1944.

Respectfully submitted,

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MARY E. DOBLE, *Petitioner,* vs. WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN, *Respondents.*	No. 197

CONSOLIDATED CLOSING BRIEF ON PETITIONS FOR WRITS OF CERTIORARI.

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In the Supreme Court
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The certiorari petitions filed in these matters were deemed sufficient to present the questions justifying issuance of writs. For that reason, briefs were not submitted therewith.

Respondents have entered appearances in both proceedings, although their briefs are directed mainly to the case of Denicke v. Brigham, et al., No. 196. In this memorandum we consolidate our reply to the arguments made in both cases. The following statement is submitted in compliance with Rule 27:

Opinions of Lower Courts.

In Denicke v. Brigham, No. 196, the District Court opinion is at R 88—reported at 45 Fed. Supp. 868; Circuit Court opinion is at R 115—reported at 142 Fed. 2d 221.

In Doble v. Buck, No. 197, there was a memorandum opinion at R 76, not reported; the Circuit Court opinion, R 93, is reported at 142 Fed. 2d 225.

Jurisdictional Statement.

This is part of the petition in both cases. (Petition in No. 196 at page 16; petition in No. 197 at page 14.) We adopt those statements herein.

Specifications of Error.

The District Court committed error in refusing to retain jurisdiction of each count of the complaints filed in both of these matters. The Circuit Court arbitrarily refused to correct that error, in violation of precedent. We adopt the following statements from the petitions on file:

No. 196 pages 4-10; 11-14; 16-18.

No. 197 pages 4-16.

Enlargement of Record.

We seek to lay a *complete* record before this Court. There are three exhibits to sustain the motions for enlargement of record:

---

1. **Opinion as printed by Clerk.**

". . . therefore that court had no jurisdiction over the subject matter of the action.
"Judgment affirmed.

(Endorsed): Opinion. Filed Apr. 27, 1944.
Paul P. O'Brien, Clerk."[1]

---

2. **Signature clause on the original.**

". . . therefore that court had no jurisdiction over the subject matter of the action.
"Judgment affirmed.

Clifton Mathews,
United States Circuit Judge
Albert Lee Stephens,
United States Circuit Judge
William Healy,
United States Circuit Judge."

[1]Buck R 97. The same irregularity appears in the printed opinion in No. 196. See Brigham R 123.

3. Certificate attached by Clerk to present record.

"I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and five (105) pages, numbered from and including 1 to and including 105, to be **a full, true and correct copy of the entire record** of the above-entitled case in the said Circuit Court of Appeals, **made pursuant to request of counsel for the appellant,** and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, **as the originals thereof remain on file and appear of record in my office.**

"Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of May, 1944.

"(Seal) Paul P. O'Brien,
Clerk."[1a]

Materiality.

We seek a writ because the Circuit Court refused to decide the questions laid before it.

We apply directly to this Court because it is impossible to obtain relief in any other way.

That impossibility is the result of a condition within the Circuit Court. It has a present membership of six. A vote of four judges was necessary to grant rehearing.

[1a]Buck R 106, Brigham R 132.

One vote had to come from one of the judges originally assigned.

If these opinions bore only *two signatures*—(a practice permitted by CCA Rule 3)—a third judge would have been available to make up a majority for rehearing in bank. *The absence of that condition is a fact material to our case.*

The other facts are stated at pages 11-13 of the petition in Doble v. Buck, No. 197. This Court has judicial knowledge of all matters disclosed by its files. There are three cases now pending. Each involves the same judges and substantially the same litigants. The records in each, exhibit a similar condition. Those facts speak for themselves.

ARGUMENT ON THE MERITS.

This consolidation could not have been effected without the aid of a federal law. These suits charge violations of the Federal Act under which merger was completed, viz.:

1. **An unlawful agreement.** The terms thereof provide for a compulsory exchange of outstanding shares. The statute permits merger, only,—

> "... on such terms and conditions *as may be lawfully agreed upon* by a majority of the board of directors of each association ..."

No plan could lawfully compel surrender of certificates. No contract could lawfully impede or infringe the free exercise of redemption rights by minority stockholders.

2. **A false letter in violation of federal law.**

Proxies were solicited with the following letter.

"Mortimer Fleishhacker
President

Anglo California Trust Company
Commercial—Savings—Trust
San Francisco

May 25, 1932.

To the Stockholders of
Anglo-California Trust Company:

For some time the executives of your bank, in collaboration with those of The Anglo & London Paris National Bank of San Francisco, devoted themselves to an intensive study of the advantages to be gained from consolidation of the two institutions. These studies revealed unusual possibilities for extension of service to their respective clienteles, large potential savings through the elimination of duplication in head office quarters, equipment, functions and personnel, and a complete absence of competitive effort between interests naturally allied.

These findings were reported to the respective Boards of Directors of the two institutions, and **directions were given to request the necessary examinations by the Comptroller of the Currency** and apply for his preliminary approval of the terms of an agreement for consolidation. Such examination having been completed, and approval of the terms of an agreement for consolidation obtained, **a special meeting of your Board of Directors was held on May 25th, at which formal action was taken, approving and**

executing an agreement of consolidation with The Anglo & London Paris National Bank of San Francisco, and **your President was directed to call a special meeting of the stockholders for June 24th for the purpose of ratifying the action taken.**

The agreement provides:

1. That the consolidation shall be effected under the charter of The Anglo & London Paris National Bank . . . with a change of title . . .

2. That the head office shall be No. 1 Sansome Street . . .

3. It is the further intention, temporarily, to continue the operation of the present head office of The Anglo California Trust Company . . .

4. That the capital shall be $10,400,000.00 consisting of 520,000 shares of a par value of $20.00 per share, **which shall be exchanged** on the basis of four shares of stock of the consolidated bank for each present share of The Anglo & London Paris National Bank, and eight shares for each present share of the Anglo California Trust Company . . .

5. Each of the banks will place in trust all its assets not contributed to the capital funds of the consolidated institution, such trusts to be for the ultimate benefit of the stockholders of the respective institutions . . .

The capital structure was determined upon as that being ample and most serviceable in meeting the requirements of the combined clientele of the two institutions, and as that most adaptable in effecting an equitable exchange of present holdings. **The basis for such exchange, in the unanimous opinion of your Directors and Executives, is eminently fair,** having been arrived at after most careful consideration of

all the factors; there being many common advantages accruing to the benefit of the stockholders of both institutions.

The consolidation agreement having had the unanimous approval of the respective Boards of Directors and Executives, and having been duly executed by them, it is planned to make the consolidation effective as of June 30th, 1932. May we, therefore, ask that you kindly execute and return the enclosed proxy at your earliest convenience, and that you endorse and forward your stock certificates to the Trust Department of Anglo-California Trust Company, as provided in the enclosed form.

Submitted by order of the Board of Directors.
M. Fleishhacker,
President. (Brigham R 60-63.)[2]

Mortimer and Herbert Fleishhacker framed this letter. It was intended to create an erroneous opinion in the minds of stockholders. That letter amounted to a false statement of the *object* of the proposed meeting. It violated the federal law.[3]

That misconduct was affirmative. It was *misfeasance* and not *nonfeasance,* as counsel suggest. There was

---

[2]Stockholders of Anglo & London Paris National Bank received a similar communication. See Herbert Fleishhacker letter at Buck R 62-65.

[3]12 USCA 34(a) provides that ". . . agreement shall be ratified . . . at a meeting . . . after publishing notice of the time, place, and **object of the meeting** . . . and after sending such notice to each shareholder of record . . ."

Obviously, this means a **true statement of the object.** We cite 12 USCA 161, requiring banks to publish condition reports. It is held that such section calls for a true report, and that a violation of that law gives rise to an action. (*Chesbrough v. Woodworth,* 244 US 72.)

specific conduct calculated to infringe and impede the exercise of rights guaranteed by an Act of Congress.[4]

3. **Waiver of rights.** The bank sought to obtain a surrender of stock certificates *in advance of the meeting.* The Mortimer and Herbert Fleishhacker letters are plainly a solicitation for that purpose:

> "May we, therefore, ask that you kindly execute and return the enclosed proxy at your earliest convenience, **and that you endorse and forward your stock certificates** to the Trust Department of Anglo-California Trust Company, **as provided in the enclosed form.**"[5]

The form "enclosed" appears in the record. We include a copy on the next page.

---

[4]12 USCA 34(a) provides: ". . . any shareholder . . . who has voted against such consolidation . . . or has given notice in writing . . . that he dissents . . . shall be entitled to receive the value of the shares so held by him. . . ." (Full text at pp. 2-3 Appendix to Petition in case No. 197.)

This right was infringed by a contract providing for compulsory surrender notwithstanding the statute; by a letter of respondents Fleishhacker representing that stockholders had no such right; and by a solicitation of stock certificates in advance of the meeting.

[5]Extract is from Mortimer Fleishhacker letter at Brigham R 63; a similar provision appears in the Herbert Fleishhacker letter at Buck R 64-65.

"Anglo-California Trust Company,
532 Market Street,
San Francisco, California.

Attention: Trust Department

Gentlemen:

I am enclosing herewith, endorsed in blank, certificates numbered . . . for . . . shares of the capital stock of Anglo-California Trust Company.

The undersigned hereby directs and authorizes you to exchange the enclosed stock for stock of The Anglo California National Bank of San Francisco, a national banking association, upon the basis of eight (8) shares of the stock of the last named bank for one (1) share of stock of Anglo-California Trust Company.

The foregoing exchange is to be made **in accordance with the terms of a certain letter dated the 25th day of May, 1932, addressed to the stockholders of said Anglo-California Trust Company, signed by Mortimer Fleishhacker, President,** and more particularly set out in an agreement entered into between said Anglo-California Trust Company and The Anglo & London Paris National Bank of San Francisco, dated May 25th, 1932.

In the event that such exchange has not been completed on or prior to six (6) months from date hereof, you are to return to the undersigned at the address following the undersigned's signature the enclosed certificate or certificates.

Very truly yours,

.....

Address:

....."

(Brigham R 63-64.)

Consolidation Agreement.

The following provisions are relevant:

"Section 1. The Anglo & London Paris National Bank of San Francisco and Anglo-California Trust Company **are hereby consolidated** . . .[6]

"Section 3. . . . The amount of the capital stock of the consolidated association shall be $10,400,000, divided into 520,000 shares of $20. each . . .[7]

"Section 4. Of the capital of the consolidated association, 400,000 shares **shall be alloted** to the present shareholders of the Anglo & London Paris National Bank of San Francisco, being four shares of $20. par value for each share of $100. par value now held by them, and 120,000 shares **shall be alloted** to the present shareholders of Anglo-California Trust Company, being eight shares of $20. par value for each share of $100 par value now held by them.[8]

"Section 6. . . . All assets of The Anglo & London Paris National Bank of San Francisco and Anglo-

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[6]Contract was signed by directors of both institutions—to become effective when approved by two-thirds vote. (See Sec. 8.)

[7]Total capital provided was the exact amount needed to accomplish a conversion of the entire capital of both banks. There were no terms defining rights of minority stock or governing disposition of minority shares.

[8]Before merger, the Anglo London Paris Bank had 100,000 shares converted on a 4 to 1 basis into 400,000 shares; Anglo California Trust Co. had 15,000 shares converted on an 8 to 1 basis into 120,000 shares. Those facts appear in Brigham R 7 and in Buck R 6. There was no surplus. The contract contained no provision for surplus stock because all shareholders were required to submit to a conversion.

California Trust Company at date of consolidation shall pass to and vest in the consolidated association . . .[9]

"Section 8. This consolidation shall become effective **when it shall have been ratified and confirmed by the affirmative vote of the shareholders of each of said associations owning at least two-thirds of its capital stock outstanding . . .**"[10]

Circuit Court Opinion.

It was the duty of the Circuit Court to analyze and discuss this contract. That duty was not performed.

It was the duty of that Court to discuss the letters of Mortimer and Herbert Fleishhacker relied on as violations of federal statute. That duty was not performed.

It was the duty of that Court to consider the conduct of the bank in soliciting a surrender of certificates in advance of the meeting. That duty was not performed.

It has become necessary to apply for a writ because of the impossibility of obtaining a decision of those questions in the Circuit Court of Appeals for the Ninth Circuit.

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[9]This provision was unnecessary. 12 USCA 34(a) provided that ". . . all rights, franchises and interests of each of such constitutent banks . . . in and to every species of property . . . **shall be deemed to be transferred** to and vested in such consolidated national banking association **without any deed or other transfer . . .**"

That section also provided redemption rights for dissenting stock. The bank desired to adopt the terms in its favor which provided for succession to corporate property, and it did not wish to recognize the other terms that were not for its advantage.

The contract exhibits a deliberate acceptance of one provision and a disregard of the other. It would be hard to find more specific evidence of intent to violate the federal law.

[10]Brigham R 56, Buck R 55.

PRECEDENTS RECOGNIZING FEDERAL JURISDICTION.

(1) Chesbrough v. Woodworth, 244 US 72.

Facts: Directors of a national bank were charged with publishing a false condition statement. Damages were sustained because of a failure to readjust that statement to comply with reports issued by the Comptroller of the Currency. Suit was filed in the Federal Court in Michigan. Jurisdiction was challenged. It was sustained in this Court. We quote from the opinion of Justice McKenna:

> ". . . if . . . directors violate or knowingly permit the violation of any of the provisions of the National Bank Act . . . 'every director who participated . . . shall be held liable in his personal and individual capacity . . .'
>
> "This section was considered in Yates v. Jones National Bank, 206 US 158, 179, and it was held that the rule expressed by it is exclusive and precludes a common law liability for fraud and deceit. To the same effect are Thomas v. Taylor, 224 US 73, and Jones National Bank v. Yates, 241 US 541. *Necessarily a federal question is involved and there was jurisdiction in the courts below.*" (244 US 72 at 78.)

(2) Wyman v. Wallace, 201 US 230.

Facts: Suit was filed in a federal circuit court to enforce the stockholder's liability created by Section 5151 of Revised Statutes. (12 USCA 63.) There was no diversity. This Court sustained the jurisdiction of the Circuit Court. We quote from the opinion of Justice Brewer:

> ". . . if diverse citizenship was the sole basis of the jurisdiction of the Circuit Court, the decision of the

Court of Appeals would be final and there would be no appeal to this Court. 26 Stat. 828, Sec. 6. The jurisdiction of the Circuit Court, however, was not invoked on the ground of diverse citizenship—at least, not on that alone. *The case presented was one arising under the laws of the United States. It was a suit to enforce a special right given by those laws.*" (201 US 230 at 241.)

(3) Jones National Bank v. Yates, 240 US 541.

Facts: Depositors of a national bank brought suit against directors for false statements in a condition report. Action was commenced in a state court. This Court granted review from the highest court of the state because of the federal question. The jurisdiction was challenged. We quote from the opinion of Justice Hughes:

"It is insisted that the writs should be dismissed in the view that the plaintiffs in error sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendants in error. But this objection ignores the nature of the plaintiffs' case. The fact that their petitions did not refer, in terms, to the Federal statute is not controlling. Thomas v. Taylor, 224 US 73, 78, 79; Grand Trunk Rwy. v. Lindsay, 233 US 42, 48. It was alleged that statements published by the defendants, acting as directors of the bank, with respect to its financial condition, were false, and were known to be false . . . (240 US 541 at 550.)

"The conclusion of the trial court that there could be a recovery at common law, independent of the Federal statute, did not alter the inherent character of the actions . . . (240 US 541 at 550.)

"If the plaintiffs' cause of action required the application of the Federal statute in defining the liability of these directors with respect to the acts alleged and proved, the plaintiffs were entitled to its correct application . . . We conclude that this court has jurisdiction." (240 US 541 at 551.)

(4) Texas & Pacific Railway Company v. Rigsby, 241 US 33.

Facts: Suit was brought under the Federal Safety Appliance Act to recover for injuries sustained by a switchman employed in interstate commerce. The federal law contained no provision to prescribe a penalty for violations. On this ground, defendant denied the existence of a federal cause of action. A writ issued to the Fifth Circuit. We quote from the opinion of Justice Pitney:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages . . . is implied . . .

"Plaintiff's injury was directly attributable to a defect in an appliance which by the 1910 amendment was required to be secure, and the Act must therefore be deemed to create a liability in his favor . . ." (241 US 33 at 39-40.)

(5) Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks, 281 US 548.

Facts: This was a suit to enjoin violations of the Railway Act of 1926. Defendant claimed that penalties in the law did not include injunctive relief and that there was

no federal liability. A writ issued to the Fifth Circuit. We quote from the opinion of Chief Justice Hughes:

> "The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment . . . but in each case a legal obligation is created . . ." (281 US 548 at 569.)

(6) Macon Grocery Co. v. Atlantic Coast Line RR. Co., 215 US 501.

Facts: Shippers sued to enjoin enforcement of a tariff schedule alleged to violate federal law. Held that the suit arose under the laws of the United States and that the lower court had original jurisdiction. A writ issued to the Fifth Circuit. We quote from the opinion of Justice White:

> "We are of opinion that the case before us may properly be said to be one arising under a law or laws of the United States. As said by Taft, Circuit Judge, in Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. et al., 54 Fed. Rep. 730:
>
> " 'It is immaterial what rights the complainant would have had before the passage of the Interstate Commerce Law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States.' " (215 US 501 at 507-508.)

LIABILITY CREATED BY FEDERAL STATUTE.

Section 34(a) is part of the National Bank Act. Directors are made expressly liable for violations thereof:

> ". . . in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." (12 USCA Sec. 93.)

The directors of both banks were responsible. They were parties to the contract. The false letters issued by Mortimer and Herbert Fleishhacker were submitted at their request.[11]

Circuit Court Opinion.

It was the duty of the Circuit Court to analyze and discuss these cases. It was the duty of that Court to either follow these precedents, or distinguish the rules therein expressed. That duty was not performed.

It has become necessary to obtain compliance, by an application for certiorari.

THIRD COUNT.

In *Denicke v. Brigham et al.*, No. 196, there is a further ground to sustain original jurisdiction in the District Court. Before the merger, the Anglo & London Paris

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[11]Letters to stockholders include a signature clause which states that same are "Submitted by order of the Board of Directors",—Brigham R 63; Buck R 65.

National Bank published a false condition statement in violation of 12 USCA 161. It is clear that any damage resulting from that conduct will support an action, and that the cause of action is federal. (*Chesbrough v. Woodworth,* 244 US 72.)

The Denicke complaint contains charges which bring the case squarely within the rule. He alleges that he,—

> ". . . **acted in reliance upon the belief that the balance sheet . . . was a true statement . . .**" (R. 33.)

He also alleges that,—

> "**The damages which he sustained . . . are the direct consequence of the publication of an untrue condition report . . .**" (R. 33.)

The Circuit Court had no right to disregard that charge. Respondents are bound thereby, and by the conclusion of jurisdiction which necessarily follows. They seek to avoid this result by resort to a technicality. We summarize that contention:

To meet a defense based on laches, the Denicke complaint contains a statement showing how and when these claims were discovered. (Par. XVII R 41-45.) Respondents have seized upon a single sentence which they now lift out of this paragraph to support a technicality. We quote that sentence:

> "Plaintiff did not have knowledge of any of the facts set forth in this pleading prior to December, 1938." (R. 41.)

Counsel then draw an absurd and unnecessary conclusion:

> ". . . if, as alleged, petitioner did not have knowledge of any of the facts . . . he could not have made

any election in reliance upon the alleged false financial statement."[11a]

This far fetched argument was never made until counsel filed a reply brief in the Circuit Court. If that suggestion had been made in the District Court, our statement would have been corrected by amendment. We apply for issuance of a mandate which will protect our right to make that correction, if deemed necessary to confirm jurisdiction.[11b]

There is no conflict on the merits. Mr. Denicke was the victim of the false literature sent to him in violation of the Act of Consolidation. He relied on the balance sheet and upon the material furnished to him. He alleges that reliance. This includes, necessarily, the statement that he read it.

If Denicke had been aware of his rights, or if he had been aware of the false character of this balance sheet —before the meeting—he would, in ignorance, have done the precise thing required to protect his rights. *He would have appeared at the meeting in protest, and voted against*

[11a]Brief of Sullivan, Roche & Johnson p. 8.

[11b]This sentence cannot be separated from the context. The Court is requested to read the whole of par. XXVII R 41-45. The matter quoted was by way of introduction to the statements that follow—included to meet any defense of laches. We show how and when these claims were discovered; that plaintiff's first knowledge came from a study of balance sheets during a recapitalization effected in Dec. 1938; that Denicke then requested his auditor to go into the merger of June 30, 1932; that a $6,500,000 shrinkage was uncovered; and that Denicke then obtained an opinion of counsel. There is no real conflict. If there is any technicality, it is one which can and should be cleared by amendment.

the plan. His damages are the direct result of that situation.

Circuit Court Opinion.

It was the duty of the Circuit Court to analyze and discuss the third count of the Denicke complaint, and to apply the rule in *Chesbrough v. Woodworth,* to the facts there presented.

That duty was not performed.

It has become necessary to obtain compliance, by an application for certiorari.

Jurisdiction Extends to the Entire Controversy.

Where jurisdiction attaches because of a federal question, the District Court is bound to retain control over the entire controversy. Non-federal as well as federal questions must be decided. This principle is also established by precedent.

(1) Siler v. Louisville & Nashville RR Co., 213 US 175 at 191.

> "The federal questions . . . gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all . . ."

(2) The Fair v. Kohler Die Co., 228 US 22 at 25.

> "Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act . . . if the plaintiff really makes a substantial claim under an Act of Congress

there is jurisdiction whether the claim ultimately be held good or bad."

(3) Chicago Life Insurance Co. v. Needles, 113 US 574 at 579.

"And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes . . . are not repugnant . . . Such an examination itself involves the exercise of jurisdiction."

Non-federal Questions.

Petitioners Denicke and Doble each plead, in good faith, causes of action involving violations of federal statute. Those violations are an essential ingredient of the cause of action in each instance. It so happens that the pleadings also disclose violations of fiduciary duty sufficient to sustain actions at common law.

It was the duty of the District Court to retain jurisdiction of the entire case. A miscarriage of justice has resulted from a failure to discharge that responsibility.

Circuit Court Opinion.

It was the duty of the Circuit Court to correct that error. That duty was not performed.

In order to obtain compliance with the principles announced in *Siler v. Louisville etc. Co.*, 213 US 175; *Chicago Ins. Co. v. Needles*, 113 US 574; and *Fair v. Kohler*, 228 US 22, it has become necessary to apply for a writ of certiorari.

THE CONSTITUTION.

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish . . ." (Art. III, Sec. 1.)

"*The judicial power shall extend to all cases,* in law and equity, *arising under this Constitution, the laws of the United States . . .*" (Art. III, Sec. 2.)

JUDICIAL CODE.

"*The District Courts shall have original jurisdiction . . . of all suits* of a civil nature, at common law or in equity . . . *where the matter* in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, *and arises under the Constitution or laws of the United States . . .*" (28 USCA 41.)[12]

PRECEDENT.

February 1821—Chief Justice Marshall.

"A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."[13]

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[12]Where a case arises under federal law, the federal and state courts have concurrent jurisdiction (*Home Telephone & Telegraph Co. v. Los Angeles,* 227 US 278). Plaintiff is entitled to select the federal court. Defendant may remove to that court under 28 USCA 71.

[13]*Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 378.

March 2, 1885—Justice Harlan.

". . . jurisdiction is not defeated because it may appear, upon examination of this federal question, that the statutes . . . are not repugnant."[14]

April 2, 1906—Justice Brewer.

"The case presented was one arising under the laws of the United States. It was a suit to enforce a special right given by those laws."[15]

April 5, 1909—Justice Peckham.

"The federal questions . . . gave the Circuit Court jurisdiction . . . that court had the right to decide all the questions in the case."[16]

January 17, 1910—Justice White

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress."[17]

March 24, 1913—Justice Holmes.

"Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act . . . if the plaintiff really makes

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[14] *Chicago Life Insurance Co. v. Needles*, 113 US 574 at 579.
[15] *Wyman v. Wallace*, 201 US 230 at 241.
[16] *Siler v. Louisville & Nashville RR Co.*, 213 US 175 at 191.
[17] *Macon Grocery Co. v. Atlantic Coast Line RR Co.*, 215 US 501 at 507.

a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad."[18]

April 3, 1916—Justice Hughes.

". . . the question upon the case made by the plaintiffs was essentially one as to the liability of these directors for conduct governed by the Federal Act. The conclusion of the trial court that there could be a recovery at common law, independent of the Federal statute, did not alter the inherent character of the actions."[19]

April 17, 1916—Justice Pitney.

An action for violation of a duty imposed by a federal statute—arises under the provisions thereof.[20]

May 21, 1917—Justice McKenna.

An action for publication of an untrue condition statement of a national bank is federal.

"Necessarily a federal question is involved . . . There was jurisdiction in the courts below."[21]

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[18]*The Fair v. Kohler Die Co.*, 228 US 22 at 25.
[19]*Jones National Bank v. Yates*, 240 US 541 at 550.
[20]*Texas & Pacific Ry. Co. v. Rigsby*, 241 US 33 at 39.
[21]*Chesbrough v. Woodworth*, 244 US 72 at 78.

Under Section 240 of the Judicial Code, we apply for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
September 22, 1944.

Respectfully submitted,

AARON M. SARGENT,

Attorney for Petitioners.

(Appendix Follows.)